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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

FRANCIS SHEERAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GLENN A. ZEITZ, ESQUIRE
Counsel of Record
ZEITZ & TALTY
Suite 1300
1346 Chestnut Street
Philadelphia, Pa. 19107
(215) 732-3336
Attorneys for Petitioner

GLENN A. ZEITZ, ESQUIRE
RAYMOND W. COBB, ESQUIRE
On The Petition

THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA 19123 (215) 236-2000

QUESTIONS PRESENTED

1. Was the admission of testimony under Rule 404 (b) of the Federal Rules of Evidence an error which violated Petitioner's right to a fair trial?

2. Did the evidence relating to the reversed mail fraud counts and the mail fraud predicate acts, spillover and prejudice the convictions on the Taft-Hartley and RICO counts?

3. Did the introduction into evidence of the conviction of the co-defendants in a separate trial by the government's star witness deprive the Petitioner of a fair trial?

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

FRANCIS SHEERAN,

Petitioner

VS.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

Petitioner, Francis Sheeran,[1] prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which affirmed in part his judgment of conviction entered upon a jury verdict of guilty.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The petitioner, Francis Sheeran seeks a writ of certiorari to review the judgment (App. 17a) rendered in accordance with an opinion (App. 1a) of the United States Court of Appeals for the Third Circuit on January 24, 1983. The judgment modified and remanded a criminal sentence and orders for fines and forfeitures imposed on the petitioner by the District Court for the District of Delaware following a jury trial. The Third Circuit

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[1] The other co-defendants below were Eugene Boffa, Sr., Louis Kalmar, Robert Boffa and Chandler Lemon.

Court of Appeals affirmed those portions of the District Court's orders from which Petitioner seeks review in the Supreme Court.

A petition for a rehearing en banc was denied by the Third Circuit Court of Appeals (App. 19a) on February 16, 1983.

The Supreme Court has jurisdiction to review the judgment below by a writ of certiorari pursuant to 28 U.S.C. §1254(1).

PERTINENT STATUTES AND CONSTITUTIONAL PROVISION

The following statutes set forth in the Appendix are pertinent:

18 U.S.C. sections 1961, 1962, 1963, the Racketeer Influenced Corrupt Organization Act;

18 U.S.C. section 1503, Obstruction of Justice;

29 U.S.C. section 186, Taft-Hartley Act; and

18 U.S.C. section 1341, Mail Fraud.

Also, the following Federal Rules of Evidence are included in the Appendix:

Rule 404(b) and Rule 403.

STATEMENT OF THE CASE

A. Procedural History

On October 30, 1981, the Petitioner, Francis Sheeran was convicted of a RICO conspiracy charge (Indictment Count I), a RICO sustantive charge (Count II), and seven counts of mail fraud (Counts V through XI) (Court of Appeals Appendix A 78-109).[2]

The conspiracy and substantive RICO Counts were predicated on the seven mail fraud counts and on five Taft-Hartley and one obstruction of justice predicate crimes which were not charged as separate substantive counts.

The Petitioner was sentenced to two concurrent eighteen year custodial terms on Counts I and II, two consecutive sentences of one year on Counts III and IV, and seven consecutive sentences on the mail fraud counts

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[2] The Court of Appeals Appendix has been certified for transmission to this Court pursuant to Supreme Court Rule 19.2.

totalling seventeen years, six months to be served concurrently with the RICO counts, a $18,000.00 fine and forefeiture of his position as President of Teamsters Local 326.

The Third Circuit Court of Appeals affirmed the convictions on RICO and RICO conspiracy based on thirty-five Taft-Hartley predicate crimes and reversed the seven counts of mail fraud remanding for a new trial. United States v. Sheeran, ___F.2d_____(3d Cir. 1983) (App. 1a). It vacated the entire sentence, fine and forfeiture orders and directed the District Court to resentence Petitioner on both RICO Counts in light of the invalidation of those mail fraud counts which were predicates of the RICO counts.

B. Concise Statement of Facts

Petition was President of Teamsters Local 326 located in Wilmington, Delaware. The indictment and conviction were based on the following set of facts. Co-defendant

Eugene Boffa, Sr. was the principal owner of several labor leasing companies and a motor vehicle leasing corporation, All Purpose Leasing. Labor leasing companies are designed to shield their customers from negotiating with unions, and they attend to other employee matters such as payroll, withholding, social security, workers compensation and the like.

Crown-Zellerbach Corporation and Inland Container Corporation were both located in Newark, Delaware and customers of U.C.I.. The drivers employed by U.C.I. at both Crown and Inland were members of Teamster Local 326.

The jury found that Eugene Boffa, Sr. or a co-defendant conspired with the Petitioner to get a sweetheart contract for U.C.I.. This enabled U.C.I. to assure each of the customers involved in these instances of labor peace for a fee.

The jury found that when the drivers complained of inadequate benefits, the defendants purportedly gave up their contracts with their customers, fired the drivers from U.C.I.

and then caused new labor-leasing companies which were "franchisee" operations secretly controlled by Boffa to be brought in to get the same work contract from the customer and "rehire" drivers under new labor contracts which, again were sweetheart deals. Through this alleged scam, the same type operation was said to continue, notwithstanding the change in form.

The mail fraud charges were pleaded as seven independent counts and fourteen of the fifty-four predicate RICO acts which sprang from the false notices of termination. The false firing was said to defraud the drivers of (1) the loyal, faithful, and honest service of the union official; (2) economic benefits they enjoyed through rights guaranteed them by the National Labor Relations Act (NLRA), 29 U.S.C. section 157; and (3) economic benefits they enjoyed through rights they had under an existing collective bargaining agreement.

The Third Circuit found as a matter

of law that the statutory rights guaranteed by the NLRA, 29 U.S.C. section 157 could not be a basis for a mail fraud; hence the reversal of all mail fraud counts and those parts of the RICO counts where mail fraud was the predicate act.

The Taft-Hartley RICO predicates were based upon Petitioner receiving the free use of a Lincoln Continental and purchasing the Lincoln for less than its market value from All Purpose Leasing (A.P.L.) which was owned by Eugene Boffa, Sr., in order to corruptly influence Petitioner as a union offical.

At trial, Petitioner asserted by way of defense, that at no time did he know of any relationship between U.C.I. and the new labor leasing companies that replaced U.C.I.. Petitioner further asserted that the contracts entered between Local 326 and U.C.I. were arms-length transactions bargained for based upon the existing economic conditions.

Petitioner asserted by way of defense

to the Taft-Hartley predicates, that he had made cash payments, in person, to Eugene Boffa, Sr.. Further, there was substantial testimony concerning what constituted fair market value for the automobile, which can be best described as inconclusive. Petitioner asserted that the car was bought in an arms-length transaction for full and adequate consideration.

REASONS WHY THE WRIT SHOULD BE GRANTED

(1) In affirming the decision of the District Court as to the admissibility of the testimony of Robert DeWan and Travis Dumas under Federal Rule of Evidence 404(b), the Court of Appeals refused to consider applicable case law of the Second and Third Circuit Courts of Appeal. The Court's decision gives an overly broad interpretation of admissibility under Rule 404(b) while the Court completely overlooked the prejudicial impact of the testimony on Petitioner's right to a fair trial, thereby failing to apply a balancing test as is required under Rule 403. By this decision, the Circuits have become divided as to the admissibility of evidence under Rule 404(b) when there has been an offer to stipulate to the evidence, therefore, this Court should resolve the conflict.

(2) The Petitioner was convicted on a multi-count (11) indictment but on appeal Petitioner's seven mail fraud counts were reversed. There-

fore, the mail fraud predicate acts which supported the RICO convictions were reversed. However, there were additional predicate acts to support the RICO counts. Petitioner argued on appeal that the overwhelming bulk of the evidence and testimony presented at trial related to the mail fraud counts. When the Court of Appeals reversed the mail fraud counts it allowed the RICO and Taft-Hartley convictions to stand; much of the evidence used by the jury to support this conviction related to the reversed mail fraud counts. If, Petitioner had been on trial only for the RICO and Taft-Hartley counts most of the mail fraud evidence would have been inadmissible. Consequently, Petitioner was denied a fair trial because his conviction is based on evidence which did not relate to those counts. The mail fraud counts were remanded for a new trial therefore it would pose no additional burden to grant a new trial on all of the counts. The Circuit Court's ruling is so unfair as to invoke this Court's supervision to prevent a manifest

injustice.

(3) The Petitioner was denied a fair trial because of the admission into evidence of the convictions of the co-defendants in a separate trial. The Court of Appeals found that counsel for the Petitioner had "opened the door" for the admissibility of this evidence. A clear reading of the entire incident shows that the Court of Appeals was erroneous. The Petitioner asserts that this is an error of such magnitude as to invoke this Court's supervisory power.

POINT I

A. THE THIRD CIRCUIT COURT OF APPEALS DID NOT APPLY APPLICABLE CASE LAW TO THE TESTIMONY OF ROBERT DEWAN AND TRAVIS DUMAS AND THIS CAUSED A DIVISION BETWEEN THE CIRCUITS AND WITHIN THE THIRD CIRCUIT.

B. THE CIRCUIT COURTS OF APPEALS ARE DIVIDED ON THE ISSUE OF WHETHER AN OFFER TO STIPULATE IS SUFFICIENT TO PREVENT THE ADMISSION OF EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 404(b), WHICH WOULD TEND TO PROVE THE FACT WHICH WOULD BE STIPULATED TO.

At trial, the Government introduced evidence relating to the bribery and attempted bribery of three Teamsters' officials through the testimony of Robert De Wan and Travis Dumas. These incidents were not included as part of the indictment and no charges have ever been brought on these incidents. It was through the testimony of these two individuals that the most prejudical and inflammatory evidence was admitted.

The trial court ruled that this testimony was admissible under the rationale of Rule

404(b) of the Federal Rules of Evidence. The purpose for which this evidence was admitted was to show control by Robert Boffa and Eugene Boffa, Sr. over the respective "franchisees."

Travis Dumas is a former Teamsters official in Florida. His testimony revolved around two meetings between Dumas and Robert Boffa. Dumas testified that Robert Boffa had approached him and requested that Dumas create labor problems so that the effected companies would hire Country Wide Personnel (C.W.P.) of Miami. In return, Robert Boffa promised to provide Dumas with employee lists from companies that Dumas wished to organize as union plants. Dumas further testified that Boffa offered to provide Dumas with a lease car for a nominal rate. Dumas also testified that Boffa stated he had given a Cadillac as an outright gift to John Greely, a director at the International Brotherhood of Teamsters, Warehouse Division. It is asserted by the

Government that the foregoing shows that Robert Boffa exercised control over C.W.P. of Miami.

Robert DeWan testified concerning the issuing of checks from the accounts of C.W.P. of California, a "franchisee" at the direction of Eugene Boffa. The Government then introduced the purpose of some of the checks-that they were lease payments on automobiles leased by Leroy Noones, a business agent for the Teamsters local in Oakland, California. The purpose of this testimony was to show that Eugene Boffa, Sr. controlled C.W.P. of California.

The Petitioner did not dispute that the Boffas controlled any of the "franchisees". Rather, by way of defense, Petitioner testified that he had no personal knowledge of the Boffas control or ownership over these "franchisees". The Petitioner was willing to stipulate that the Boffas did in fact control these various companies but this was rejected by the Govern-

ment. The Government agents involved in this investigation testified that the relationship between the Boffas and the "franchisees" was discovered only after an extensive review of substantial documents which were produced pursuant to a subpoena.

The Petitioner asserted at trial and on appeal that this testimony should not have been admitted into evidence for two reasons. First, under Rule 403 of the Federal Rules of Evidence this testimony's probative value is substantially outweighed by the enormous prejudicial impact on Petitioner. The Petitioner also asserted that this testimony was irrelevant as it did not satisfy the requirements of Rule 404(b) of the Federal Rules of Evidence. The trial court rejected these arguments and admitted the testimony to show control by the Boffas of the "franchisees". The Third Circuit Court of Appeals affirmed the admissibility of this evidence. This is a case of first impression for this Court.

This decision by the Third Circuit Court of Appeals serves to place the law in regards to Rule 404(b) of the Federal Rules of Evidence, in confusion within the Third Circuit and causes there to be a split among the Circuit Courts of Appeal in regard to the issue of the admissibility of evidence under Rule 404(b).

It is well established that the admissibility of evidence under Rule 404(b) must be weighed against the prejudicial impact of such evidence, and if the prejudicial impact outweighs its probative value the evidence should be excluded under Rule 403. United States v. Long, 574 F.2d 761, 766 (3d Cir. 1978); United States v. Halper, 590 F.2d 422, 432 (2d Cir. 1978); United States v. Knuckles, 581 F.2d 305, 314 (2d Cir. 1978). The Third Circuit Court of Appeals failed to consider the prejudicial impact of this testimony holding that the cautionary instruction given to the jury overcomes the prejudicial impact.

The testimony of Dumas and DeWan had enormous prejudicial impact on Petitioner which outweighed its probative value. On trial was a Teamsters official accused of receiving bribes. The testimony, although admitted to show control, revolved around the bribing or attempted bribing of other Teamsters officials. This testimony coupled with commonly held opinion that the Teamsters union is a front for the mob and throughly corrupt had the effect of convicting Mr. Sheeran on the basis of his position in the Teamsters union and connection with the Boffas. The prejudice inherent in this testimony and the damaging effect cannot be overstated. A cautionary instruction is insufficient to cure the inherent prejudice.

The Third Circuit Court of Appeals did not apply the balancing test but rather held that the evidence was relevant and did tend to show control overlooking the unfair prejudice this testimony caused and not applying

the applicable law. The testimony is extremely prejudicial and control could easily have been proven by other evidence which would not have prejudiced the Petitioner. The testimony created a scenario of such corruption that the jury could easily believe that the Petitioner was involved simply by his association with the Boffas.

The Third Circuit Court of Appeals in rendering its decision has caused a split in authority among the Circuit Courts of Appeal. Specifically, the decision in Sheeran is contrary to the decision of the Second Circuit Court of Appeals in United States v. Manafzadeh, 592 F.2d 81 (2d Cir. 1979) and United States v. Mohel, 604 F.2d 748 (2d Cir. 1979).

In Manafzadeh the Second Circuit Court of Appeals held that the prosecution could not introduce evidence of similar crimes under Rule 404(b) as bearing on defendant's criminal intent where intent was only

"technically at issue, [but] not really in dispute" in light of the defense of no involvement at all in the criminal conduct and defense counsel's offer to stipulate the existence of intent if the jury found the other elements of the offense. United States v. Manafzadeh, supra, 592 F.2d at 87.

The Second Circuit Court of Appeals subsequently relied on Manafzadeh to decide Mohel. The Court held in Mohel that "It is enough that a defendant has unequivocally offered the concession and then acts accordingly." United States v. Mohel, supra, 604 F.2d at 754 (emphasis in original). See e.g., United States v. DeVaughn, 601 F.2d 42, 46 (2d Cir. 1979); United States v. Manafzadeh, supra, 592 F.2d at 87. The Court further held that,"Once the offer [to stipulate] is made, the other crime evidence should be excluded." United States v. Mohel, supra, 604 F.2d at 754.

Therefore, it is well established from

the cases in the Second Circuit that an oral offer to stipulate to an element or fact in issue removes that fact or element from being an issue at trial and prevents the Government from using evidence admissible under Rule 404 (b) to be used. Notwithstanding the Government's refusal to accept the stipulation the element or fact will not be an issue if there is an unequivocal concession.

The Petitioner's case is indistinguishable from Manafzadeh and Mohel. In Sheeran, the issue of control was only technically in dispute as Mr. Sheeran in no way disputed or offered any defense to the fact that the Boffas controlled the "franchisees". Petitioner asserted only that he had no personal knowledge of this control. Counsel for Petitioner orally offered to stipulate to the fact that the Boffas controlled the respective "franchisees" but this was rejected by the Government. Despite the foregoing the Third Circuit Court of Appeals disregarded the similarities between Manafzadeh and Mohel with Sheeran and

held that the testimony of DeWan and Dumas was properly admitted into evidence under Rule 404(b) of the Federal Rules of Evidence.

The Third Circuit Court of Appeals relied upon the case of United States v. Provenzano, 620 F.2d 985, 1003-04 (3d Cir. 1980), which held that although there is an offer to stipulate a fact may still be proved if the probative value exceeds the prejudicial effect. Therefore, without the stipulation "the Government was entitled to introduce evidence probative of that fact." United States v. Sheeran, _____F.2d _____, No.82-1026, slip op. 12, Fn.12, (3d Cir. Jan. 24, 1983). The Court of Appeals completely disregarded the unfair prejudice which resulted from the testimony, treating it as though there was not any impact on the jurors of hearing of the corrupt practices of two Teamsters officials and the Boffas. The effect of this testimony on Mr. Sheeran's right to a fair trial cannot in good con-

science be overlooked.

The division of authority in the Circuit Courts of Appeal on the admissibility of evidence under Federal Rules of Evidence, Rule 404(b) when there is an offer to stipulate as to fact that the evidence is admitted to prove, requires resolution by the Supreme Court not only because of increasing use of Rule 404(b) as the basis for admissibility but also because this Court has never ruled on this issue. There is no Supreme Court precedent to serve as a guide. Without a decision by this Court, it will be likely that the Circuit Courts of Appeal will decide similar cases with increasing disparity and thus turn Rule 404(b) into a "patchwork" rule of evidence and decrease the uniformity it is designed to promote.

The Third Circuit Court of Appeals decision in Sheeran went against established case authority in both the Second and Third Circuits. Specifically, the case is contrary to the decisions in United States v.

Pantone, 609 F.2d 675, (3d Cir. 1979); United States v. McCann, 589 F.2d 1191, 1198 (3d Cir. 1979); United States v. O'Connor, 580 F.2d 38, 41, (2d Cir. 1978); United States v. Benedetto, 571 F.2d 1246, 1249 (2d Cir. 1978).

These cases held that evidence would not be admitted under the rationale of Federal Rules of Evidence 404(b) where the issue, while technically in dispute, was not really contested. The respective Courts states in such cases, this type of evidence better served the ends of justice when it was used in rebuttal of a general denial of an issue rather than being used in the prosecutions case in chief.

The Court in Sheeran rejected the applicability of Pantone and McCann stating only that these cases are not "apposite here." United States v. Sheeran, supra. _____F.2d at _____, slip op. at 12 Fn.13.

The Third Ciruit Court of Appeals also

disregarded established case law within the Second and Third Circuits in particular United States v. Bocra, 623 F.2d 281 (3d Cir. 1980) and United States v. O'Connor, supra. These cases enunciated the rule that if the evidence raised speculative inferences or does not complete the story in question such evidence should be excluded. The testimony of both Dumas and DeWan raised the speculative inferences that a union official in contact or dealing with the Boffas has received or been offered a bribe.

The testimony of DeWan does not complete the story of control; the fact that checks were issued at the direction of Eugene Boffa, Sr., would tend to show control by Mr. Boffa but the purpose of the checks does not prove control but is extremely prejudicial to Mr. Sheeran. The testimony of Dumas atempts to show Robert Boffa's control over C.W.P. of Miami. However, the fact that an employee offers someone a bribe on behalf of a corpora-

tion is not always indicative that the individual controls the corporation. Furthermore, C.W.P. of Miami was not involved in any of the switches, therefore its relevance is suspect.

The Third Circuit Court of Appeals ignored all of the foregoing cases despite the factual and legal similarities without explaining or distinguishing Sheeran from those cases. Consequently, Sheeran will create confusion among the Circuit Courts of Appeal as it does not follow established case law.

It is submitted that to allow the admission of this evidence to show control over the companies is an over-broad interpretation of Rule 404(b) of Federal Rules of Evidence. It is well established that an inclusionary approach has been taken to this rule, United States v. O'Connor, supra, 480 F.2d at 40, United States v. Benedetto, supra, 571 F.2d at 1248, United States v. Long, supra, 574 F.2d at 766. However, it is illogical to

assume that there are no limits to the admissibility of evidence under this rule.

In Sheeran control of the "franchisees" was not one of the elements of the mail fraud statute which must have been proven in order to establish a prima facie case. It is submitted that to include the testimony of DeWan and Dumas to show control as within the ambit of Federal Rules of Evidence 404(b) is to allow literally anything to fall under the rule. This certainly is not proper.

Consequently, it is necessary for this Court of resolve the conflicts which arise both between the Circuit Courts of Appeal and within the Third Circuit. Without a decision from this Court the split of authority among the Circuits will continue to grow. However, this Court's decision will serve to clarify what evidence can permissibly be admitted under Rule 404(b) of the Federal Rules of Evidence.

POINT II

THE PREJUDICIAL EFFECT OF THE EVIDENCE RELATING TO THE REVERSED MAIL FRAUD COUNTS TAINTED THE TAFT-HARTLEY AND RICO CONVICTIONS.

At trial substantial testimony and evidence was introduced relating to the mail fraud counts. This testimony consisted of two-thirds of all of the government's witnesses and over one-half of the trial. This testimony was primiarily presented to show control by Eugene Boffa, Sr. over the "franchisees."

The majority of these witnesses were members of Local 326, the union that Mr. Sheeran represented as its president. The prejudicial effect that this testimony had on the jury cannot be overscored. These drivers testified concerning the loss of their seniority, vacation and pension rights all of which related to the mail fraud counts and predicate acts. However, this testimony

carried over to reflect upon the character of Mr. Sheeran. The impact of this testimony was devastating upon Mr. Sheeran because the jury could readily believe if Petitioner would "sell out his union" in relation to the mail fraud, he would also accept a bribe.

The Third Circuit Court of Appeals summarily rejected this "spillover" argument stating only "it is without merit." The prejudice inherent in allowing a conviction to stand after the bulk of the case has been reversed is manifestly unjust and should required reversal of the entire case and a new trial granted.

POINT III

THE INTRODUCTION INTO EVIDENCE OF THE CONVICTION OF THE CO-DEFENDANTS IN A PRIOR TRIAL BY THE GOVERNMENT'S STAR WITNESS DEPRIVED PETITIONER OF A FAIR TRIAL.

The introduction of the convictions of the co-defendants of Mr. Sheeran in a previous

trial by the prosecutor was improper and a mistrial should have been granted. The fact that another jury found that persons indicted with Mr. Sheeran were guilty is not relevant to the determination of Mr. Sheeran's guilt. The Sixth Circuit examining a similar question stated "It [conviction of co-defendants] has no tendency to make the existence of that guilt [the defendants'] more probable or less probable than it would without the evidence. Their conviction [co-defendants'] is not an element of the crime." United States v. Vandette, 523 F.2d 1144, 1147 (6th Cir. 1980). The jury might well have concluded Mr. Sheeran's guilt is established by co-defendants' prior convictions.

The Third Circuit Court of Appeals held that the door had been opened by defense counsel. A clear reading of the entire record disproves this. A new trial should have been granted and this Court should reverse the entire conviction.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this writ of certiorari should be granted.

Respectfully submitted,

GLENN A. ZEITZ

GLENN A. ZEITZ, ESQUIRE
RAYMOND W. COBB, ESQUIRE

On The Petition

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1026

UNITED STATES OF AMERICA,
Appellee

v.

FRANCIS SHEERAN,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

(D.C. Crim. No. 80-36-2)

Argued October 19, 1982

Before: WEIS and BECKER, *Circuit Judges*, and
CAHN,* *District Judge*.

(Filed January 24, 1983)

Glenn A. Zeitz (Argued)
1346 Chestnut Street
Philadelphia, PA 19107
Attorney for Appellant

Joseph J. Farnan, Jr.
United States Attorney
District of Delaware

Frank J. Marine (Argued)
Department of Justice
Washington, DC

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*Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Ronald G. Cole
Kenneth F. Noto
Special Attorneys
Department of Justice
Philadelphia, PA 19106
Attorneys for Appellee

OPINION OF THE COURT

BECKER, *Circuit Judge.*

Francis Sheeran, president of a union local, appeals from a judgment of sentence following his conviction by a jury. Sheeran was found guilty of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(d) (1976); participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. §1962(c) (1976);[1] receiving illegal benefits (two counts), in violation of the Taft-Hartley Act, 29 U.S.C. §186(b)(1) & (d) (1976); and committing mail fraud (seven counts), in violation of 18 U.S.C. §1341 (1976).[2] This Court has jurisdiction under 28 U.S.C. §1291 (1976) (amended 1982).

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1. 18 U.S.C. §§1962(c) and (d) (1976) are parts of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968 (1976 & Supp. V 1981), which, *inter alia*, makes it unlawful for a person to conduct or conspire to conduct the affairs of an "enterprise" by means of a "pattern of racketeering activity."

2. Appellant was sentenced to: concurrent 18-year terms of imprisonment on the RICO and RICO-conspiracy convictions; consecutive one-year terms of imprisonment on the two Taft-Hartley convictions; and consecutive 30-month terms of imprisonment on each of the seven mail-fraud convictions (totalling 17½ years). The Taft-Hartley and mail-fraud sentences were to be served concurrently with those imposed on the racketeering counts. In addition, appellant was fined $27,000 — $5,000 for each of the two racketeering convictions and each of the two Taft-Hartley convictions, and

Appellant was tried on an indictment that named as co-defendants Eugene Boffa, Sr., Robert Boffa, Sr., Louis Kalmar, Chandler Lemon, David Mishler, and Robert Rispo. These men all were connected, in one form or another, with the business of labor leasing: they furnished labor — in this case, truck drivers — to various employers who did not wish to hire their own workers or to negotiate contract terms with the workers' collective-bargaining representative. The indictment charged the defendants with engaging in a series of labor-racketeering schemes allegedly effected mainly by switching the labor-leasing contracts at various industrial plants from companies controlled by the co-defendants to other companies that were ostensibly independent but that in fact were also controlled by appellant's co-defendants (principally the Boffas) while covering up this control. According to the indictment, the switches resulted in a loss of wages and benefits to the employees of the co-defendants' labor-leasing companies when the contracts under which they worked were terminated so that the co-defendants could obtain new, more favorable leasing contracts involving their other labor-leasing companies. The co-defendants also allegedly made payoffs to appellant, the president of Teamsters' Union Local 326, in Wilmington, Delaware, whose members were employees of the labor-leasing companies in question, thus obtaining appellant's cooperation and acquiescence in the scheme and avoiding difficulties with the union.

On the basis of these factual allegations, the indictment charged the defendants with: (1) defrauding the employees of several labor-leasing companies of their right to economic benefits guaranteed by section 7 of the

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$1,000 for each of the seven mail-fraud convictions. Finally, pursuant to the RICO forfeiture provision, 18 U.S.C. §1963(a) (1976), appellant was required to forfeit his position as president of Teamsters' Union Local 326.

National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976); (2) defrauding the employees of their contractual right to wages and benefits; (3) defrauding the employees of their right to the loyal, faithful and honest services of appellant, in his capacity as president of their union, Teamsters' Local 326; (4) making payoffs to appellant in exchange for assurances of labor peace and assistance in obtaining contracts; and (5) obstructing justice by supplying altered documents to a grand jury.

Appellant's case was severed from that of the co-defendants,[3] who were tried first and convicted.[4] The co-defendants then appealed, and their convictions were affirmed in part and vacated in part in an opinion filed on August 25, 1982, *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 1, 1982) (No. 82-814). Because *Boffa's* holding requires that we vacate appellant's sentence and remand for further consideration, we take up first the impact of *Boffa* on this case.

I.

Boffa involved a number of challenges to the indictment and to the sufficiency of the evidence, although we devoted most of our attention to the contention of appellant's co-defendants that Congress did not intend to impose criminal penalties on those who commit unfair labor practices by violating the rights guaranteed under section 7 of the NLRA. We agreed with the co-defendants' argument and held that the mail-fraud statute, 18 U.S.C. §1341, does not apply to schemes to defraud peo-

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3. Before trial, Rispo entered a plea of guilty to Count I pursuant to a plea agreement with the Government. Mishler's case was severed from this action and ultimately was dismissed.

4. The evidence adduced at appellant's separate trial overlapped substantially with that introduced during the co-defendants' earlier trial.

ple of rights derived exclusively from section 7. We noted that rights created by section 7 are part of a comprehensive federal labor policy that vests administrative and punitive powers exclusively in the NLRB. *See Boffa*, *supra*, 688 F.2d at 925-31.

In contrast, we also held in *Boffa* that Congress did intend the mail-fraud statute to encompass the counts of the indictment alleging that the co-defendants had defrauded the employees of the labor-leasing companies of both their rights under an existing contract and the loyal and faithful services of their union representative. *See id.* at 930-31. By definition, the right to benefits under an existing contract is rooted in contract law, and the right to the loyal and faithful service of a union representative derives from the duty imposed on such a representative by section 501 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §501(a) (1976). Unlike section 7, neither contract law nor section 501 is part of a self-contained and exclusive remedial scheme.

Having found that the Government's mail-fraud theories were only partially valid, and unable to tell whether the jury had considered the invalid theory in reaching its verdict, we reversed the mail-fraud convictions as well as those RICO convictions that depended on mail fraud for their predicate acts of racketeering and remanded for a new trial on the valid mail-fraud theories. We affirmed the remaining RICO convictions.[5]

Appellant's conviction was based on the same indictment that was considered in *Boffa*. Because we are bound by the *Boffa* decision, *see* United States Court of Appeals for the Third Circuit, Internal Operating Procedures ch. VIII, §C; *see also United States v. American Bag & Paper Corp.*, 609 F.2d 1066, 1067 n.3 (3d Cir. 1979) (determination by prior panel is law of the case

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5. The predicate acts for these convictions were Taft-Hartley violations and obstruction of justice.

and binds future panels), we are obliged to reverse appellant's mail-fraud convictions (counts 5-11) and remand for a new trial based on the two valid theories of mail fraud. Appellant's RICO convictions (counts 1 and 2), however, are predicated on at least two acts of racketeering that are independent of the mail-fraud offenses:[6] by special verdict, the jury found that appellant had committed numerous predicate racketeering acts involving violations of section 302 of the Taft-Hartley Act, 29 U.S.C. §186 (1976 & Supp. V 1981).

Although, in view of the foregoing, we see no warrant for reversing appellant's RICO convictions, we do think it appropriate to remand for resentencing. While appellant's sentence and the judgment of forfeiture could have been premised on the numerous predicate racketeering acts that remain unaffected by our resolution of the mail-fraud issue, we note that we vacated the sentences imposed on Eugene Boffa for RICO convictions because the "district court may have considered the mail fraud predicate acts in sentencing. . . ." *See Boffa, supra*, 688 F.2d at 939. We also vacated the judgments of forfeiture against defendants Eugene Boffa and Louis Kalmar to permit the district court to determine whether disposition of the appeal "in any way affects [the district court's] prior forfeiture order." *Id.* Like the *Boffa* court, we cannot be sure whether the district court sentenced appellant on the basis of the mail-fraud predicate acts or whether the disposition of this appeal would

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6. The substantive and conspiracy provisions of RICO proscribe the conducting of the affairs of an enterprise through a "pattern of racketeering activity." 18 U.S.C. §1962(c), (d) (1976). The Act defines a "pattern of racketeering activity" as "at least two acts of racketeering activity [as defined by 18 U.S.C. §1961(1)], one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." 18 U.S.C. §1961(5) (1976 & Supp. V 1981).

in any way affect that court's judgment of forfeiture. We therefore will remand for resentencing and for reconsideration of the judgment of forfeiture. We note that the Government, in response to our requests for comments concerning the effect of *Boffa* on this appeal, agreed that this disposition would be appropriate.

II.

This disposition does not end the matter, however, for appellant has raised a number of claims of trial error that would, if successful, require us to grant a new trial rather than simply remand for resentencing on the remaining counts. Insofar as some of the same arguments were rejected in *Boffa*,[7] we must reject them here.[8] Appellant, however, has advanced a number of arguments that are peculiar to his case, and we now turn to these claims.

A.

Appellant contends that he should be granted a new trial because the district court erroneously admitted into evidence the prejudicial testimony of Government witnesses Robert DeWan and Travis Dumas. DeWan, an alleged co-conspirator, operated Countrywide Personnel ("CWP") of California, the company to which the defendants switched Crown Zellerbach's labor-leasing con-

7. Pursuant to Fed. R. App. P. 28(i), appellant has adopted the arguments of his co-defendants on appeal.

8. These claims of error include: (1) the charge to the jury on the elements of RICO conspiracy; (2) the failure to charge the jury that a Taft-Hartley violation is a lesser included offense of a substantive RICO violation; and (3) the use and form of special interrogatories. Essentially the same charge and interrogatories were used in both trials. To the extent that there are any significant variations, we note our independent endorsement of the result reached in *Boffa*.

tract. DeWan testified that, during the course of the conspiracy, he had issued checks drawn on the account of CWP of California, at Eugene Boffa's direction, to pay for the lease of a car by Leroy Noones, a union official in Oakland, California. Dumas, a Florida union representative, testified that, during the course of the conspiracy, Robert Boffa had offered him various benefits through CWP of Miami, another labor-leasing company controlled by the Boffas and involved in the scheme, in exchange for his assistance in obtaining labor-leasing contracts with companies whose employees were represented by Dumas' union.[9]

The district court ruled DeWan's testimony admissible to show Eugene Boffa's control over CWP of California as well as the conspirators' intent and mode of operation; when the evidence was received, the court gave a cautionary instruction appropriately limiting the jury's consideration of the evidence.[10] The court also made a finding pursuant to Fed. R. Evid. 403 that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

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9. The benefits offered to Dumas included an automobile to be leased at a nominal rate through CWP of Miami, cash payments, and jobs for Dumas' children. Dumas rejected Boffa's offer. Dumas also testified that Boffa had told him that he had given a new Cadillac to John Greeley, an International Brotherhood of Teamsters official, who was apparently unconnected with the labor leasing companies involved in this case.

10. The court stated:

> Members of the jury, you have now heard certain evidence that Mr. [Eugene] Boffa, who is a named defendant in this case but is not being tried here at this stage, through Mr. DeWan made certain payments to a Labor Union official in California. You cannot use that testimony as a similar act that that [sic] transpired with the defendant who is on trial here. That evidence is only as [sic] limited to the mode of operation of Mr. Boffa who is alleged to have been in conspiracy with the defendant on trial here. So it is admitted for that limited purpose.

Appellant's Appendix at 321a.

Similarly, the court found that Dumas' testimony was "highly relevant for the purpose of showing . . . Robert Boffa's control over the operations of Countrywide Personnel of Miami . . . [and also for showing] intent, mode or plan of operation and absence of mistake or accident." The district court gave a similar cautionary instruction[11] and again found expressly that the probative value of Dumas' testimony was not substantially outweighed by the danger of unfair prejudice.

In both instances, then, the challenged testimony was offered only to show that co-defendants (and co-conspirators) Eugene and Robert Boffa exercised control over the labor-leasing companies to which the contracts were switched and to reveal the Boffas' intent as well as the nature of their scheme or plan. Proof of these elements was essential to the establishment of the fraud against the leasing companies' employees—the fraud which formed the basis of the mail-fraud counts. The evidence also was probative of the substantive RICO and RICO-conspiracy charges for which mail fraud constituted a predicate offense.

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11. The court stated:

> Before we start, this Witness is going to be giving testimony which is limited in nature and which you must consider it in the limited respect which I'll explain to you now.
>
> Testimony that a Defendant named in the indictment may have committed at some other time in [sic] acts similar to an act alleged in the indictment is not proof that a Defendant, in fact, committed any act alleged in the indictment. . . . Evidence, however, that a Defendant named in the indictment committed an act similar to an act alleged in the indictment may be considered by the jury for certain limited purposes. Such evidence may be considered for the purpose of showing motive, intent, plan, or method of operation, or absence of a mistake or an accident with respect to the offenses charged.
>
> The only crimes which you are to consider are those which are charged in the indictment. You're not to consider whether the Defendant is guilty or innocent of any other alleged crime other than those that are charged.

Appellant's Appendix at 262a.

Appellant concedes these points but argues that the Government's proof of control was sufficiently strong that the challenged evidence need not have been introduced at all. The probative value of this evidence, he contends, was marginal and was outweighed by the unfair prejudice of speculative inferences. To support this conclusion, appellant points out that he never had dealt with Robert Boffa and that neither Dumas nor DeWan testified about any dealings with appellant or about his responsibility for the crimes charged. Moreover, appellant asserts, the establishment of the Boffas' pattern or plan was not probative of the crimes with which appellant himself was charged; nor was the Boffas' intent an issue in appellant's own trial. The testimony, submits appellant, thus was minimally relevant, while its prejudicial impact was enormous, inviting an inference that appellant must have been bribed by the Boffas, as other union officials had been bribed by them.

We believe that the district court acted properly in admitting the challenged evidence. First, the evidence was probative of the crimes charged in the indictment. At the heart of the indictment was the charge that the co-defendants, in derogation of the economic rights of their companies' employees (who ended up with lower wages and lesser benefits), fraudulently switched labor-leasing contracts at various plants from companies controlled by the co-defendants to other companies that ostensibly were independent but that in fact were also controlled by the co-defendants. The Government thus was required to establish that the co-defendants actually controlled the various transferee companies. Testimony that Eugene Boffa directed DeWan to issue checks on the account of CWP of California to pay bribes to a union official, and evidence that Robert Boffa offered to pay similar bribes to a union official through CWP of Miami, evinced the Boffas' control over those companies. Moreover, the conspiracy charged in the indictment also em-

braced the bribing of union representatives to obtain their cooperation in the labor-leasing-company switches. Evidence that Eugene Boffa, Robert DeWan, and Robert Boffa offered such bribes to various union representatives was relevant to show the conspirators' intent and the nature of their scheme or plan.

Contrary to appellant's contention, such evidence does not become irrelevant merely because it is not probative of appellant's own personal involvement. It is well established that acts in furtherance of a conspiracy, committed by co-conspirators not on trial, are admissible against a defendant even though that defendant did not participate in those particular acts. *See, e.g., United States v. Wolfson*, 634 F.2d 1217, 1219-20 (9th Cir. 1980); *United States v. Davis*, 623 F.2d 188, 191-92 (1st Cir. 1980); *United States v. Salazar*, 485 F.2d 1272, 1276 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974); *United States v. Cole*, 365 F.2d 57, 61 (7th Cir. 1966), *cert. denied*, 385 U.S. 1024 (1967). Similarly, evidence showing the existence of a conspiracy, its mode of operation, and the other conspirators' participation is admissible at the trial of a severed co-conspirator who was not involved in such conduct. *See United States v. Etley*, 574 F.2d 850, 852-53 (5th Cir.) (appellants tried separately from co-conspirator whose acts had been introduced), *cert. denied*, 439 U.S. 967 (1978); *cf. Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946) (motive or intent may be proved by acts or declarations of only some of the conspirators in furtherance of common objective, and all members are responsible even if only one member actually committed the act).

It may well be that the Government had sufficient evidence to prove the Boffas' control of the leasing companies without having to introduce the testimony of DeWan and Dumas, but we cannot say that the Government should have been foreclosed from presenting the strongest possible case, at least in the absence of a con-

cession by the defendant.[12] Moreover, the district court twice gave a cautionary instruction regarding the limited use of the evidence, first when that evidence was admitted and again in the charge to the jury. Under the circumstances, the evidence was appropriately "fenced in," and the district court acted well within its discretion in concluding under Fed. R. Evid. 403 that the probative value of the challenged evidence exceeded its prejudicial effect.[13] Finally, the overwhelming evidence against appellant would make any putative error harmless at most[14] and insufficient on this record to justify our granting a new trial.[15]

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12. Appellant never conceded the Boffas' control of the labor-leasing companies even though he claims to have challenged only the existence of his knowledge of that control. Absent such a stipulation by appellant, the Government was entitled to introduce evidence probative of that fact. Although "[a]n offer to stipulate does not *automatically* mean that the fact may not be proved instead, as long as the probative value of the proof still exceeds the prejudicial effect, taking into account the offer to stipulate," United States v. Provenzano, 620 F.2d 985, 1003-04 (3d Cir. 1980) (emphasis added), we have held that evidence admissible in the absence of such a concession sometimes should not be admitted where the defendant has offered "a suitable stipulation . . . that would convey the same fact," *id.* at 1004.

13. Appellant relies on a number of cases, including United States v. Bocra, 623 F.2d 281 (3d Cir. 1980); United States v. Pantone, 609 F.2d 675 (3d Cir. 1979); United States v. Forsythe, 594 F.2d 947 (3d Cir. 1979); and United States v. McCann, 589 F.2d 1191 (3d Cir. 1978), none of which is apposite here.

14. *Cf.* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

15. The operation of the labor-leasing scheme is generally described in the *Boffa* opinion; hence, we need not repeat that description here. The Government used numerous witnesses and various kinds of documentary evidence at appellant's trial to present the workings of the scheme. The most dramatic evidence of appellant's role came from the testimony of Robert Rispo, a convicted co-conspirator, and of Charles Allen, a Government informant who was "wired" by the FBI, as well as from tape-recordings made of

APPENDIX A

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B.

Appellant also alleges that he was deprived of a fair trial because the Government introduced evidence, through the testimony of Charles Allen, that appellant's co-defendants had already been convicted of the same

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conversations among Allen, appellant, and co-defendant Eugene Boffa. The testimony and the tapes demonstrated appellant's knowing and full participation in the scheme to defraud members of the union by appellant's acquiescing in labor-leasing switches that resulted in reduced wages and benefits for those union members able to obtain employment with the substituted labor-leasing company and in unemployment for still other employees. In one instance, another union even replaced Teamsters' Local 326 as collective-bargaining representative for the employees of the Boffa-controlled labor-leasing company. The Government also adduced circumstantial evidence of communications between appellant and Eugene Boffa with respect to the particular "switches" involved. This evidence revealed that appellant had agreed to the new contract terms on behalf of Local 326 even before the switches were effected.

There was clear evidence that appellant had received payoffs from Eugene Boffa in return for his participation in the switches. Rispo testified that appellant had admitted that he was receiving the free use of automobiles and a percentage of the profits from the labor-leasing contracts. Rispo also testified that he personally had witnessed some of the cash payoffs to appellant by Eugene Boffa. Allen testified to similar effect, and both Allen's testimony and the conversation on the tapes established that appellant was receiving a percentage of Boffa's profit on the labor-leasing contracts. While the precise amount that appellant received never was firmly established, a 5% payoff was mentioned at several points, and, at another point, when a proposal for a new arrangement was being discussed, appellant commented that "Boffa gets half and I get half."

Many witnesses in addition to DeWan, Dumas, Rispo, and Allen testified about the workings of the scheme, the mechanics of the automobile-leasing payoffs, and the impact of the switches. *Inter alia*, the Government also produced as witnesses the personnel of trucking companies who did labor-leasing business with Boffa-controlled labor-leasing companies, white-collar employees of two of those leasing companies, an FBI financial analyst, and a number of truck drivers who had suffered economic disadvantage as a result of

crimes.[16] Allen, however, stated merely that he had testified in two trials that had resulted in guilty verdicts; he did not identify the convicted parties. Moreover, even if Allen *had* testified that the co-defendants had been convicted at a previous jury trial in which he testified, the admission of his testimony would not be grounds for reversal. The entire subject of Allen's testimony at the prior trial was first introduced when defense counsel sought to impeach Allen's credibility by showing that he had testified at trials (including one involving appellant) that had resulted in *acquittals*, the intended implication being that the jury should not find Allen credible because juries in other cases in which he had testified had acquitted the defendants. The district court thus properly found that appellant had "opened the door" and that the Government therefore should be allowed to attempt to rehabilitate Allen by eliciting evidence that he testified in previous trials resulting in convictions. The district court's cautionary instructions also preclude us from finding any reversible error.

C.

Appellant also contends that the district court erred in failing to instruct the jury regarding appellant's own "theory of defense." In particular, he argues that his receipt of the free monthly use of an automobile over a

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NOTE — *(Continued)*

the labor switches and who identified employment-termination notices received by mail that did not reveal the true state of affairs about the labor switches, thus establishing that the fraud had been executed with the aid of the mails. The documentary evidence offered with respect to the automobile-lease transactions is fairly summarized in Part V.B. of the *Boffa* opinion, 688 F.2d at 935-36, and need not be repeated here.

16. Allen, a Government informant, testified regarding his tape-recorded conversations with appellant and Eugene Boffa. *See supra* note 15.

three-month period constituted a single, rather than a multiple, violation of Taft-Hartley (and thus only a single predicate offense under RICO, which requires at least two predicate acts) and that the jury should have been so charged.[17]

We reject this contention for several reasons. First, *Boffa* addressed and rejected a similar argument by appellant's co-defendants. 688 F.2d at 934-36. Although appellant would have us distinguish this case by focusing on his receipt, rather than on the co-defendant's delivery, of the automobile, appellant's own testimony at trial established that he had made monthly car-lease payments, and *Boffa* specifically held that each monthly payment for the free use of an automobile by appellant was a separate "thing of value" and therefore could constitute a separate Taft-Hartley offense. *Id.* at 934. Second, the jury found by special verdict that appellant had received the free use of three separate automobiles over different periods of time. Thus even under appellant's theory that "the free use of the automobile for the entire period" constitutes a single offense, the evidence still would have established at least three separate offenses.[18] The district court did not err in refusing to charge in accordance with appellant's theory with respect to the car payments; nor are the convictions on the multiple Taft-Hartley counts infirm.[19]

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17. Appellant raises the same argument in challenging the validity of his multiple Taft-Hartley convictions.

18. The jury also found that the sale to appellant of a 1975 Lincoln Continental for substantially less than market value constituted an additional Taft-Hartley-derived racketeering act on appellant's part.

19. Appellant's contentions as to "theory of defense" also have a broader compass and resemble those raised by the co-defendants whose appeals we considered in *Boffa*. We there rejected those contentions summarily, 688 F.2d at 939, and we find no greater merit in them here.

D.

Finally, appellant argues that he must be granted a new trial on the remaining counts because of prejudicial "spillover effect." In other words, appellant asserts that his Taft-Hartley and RICO convictions should be overturned because: (1) the mail-fraud convictions must be reversed in light of *Boffa*; (2) the bulk of the evidence presented at trial related to mail fraud; (3) the jury's decision on the Taft-Hartley counts was influenced by the unfavorable impression of appellant that the jurors formed from the mail-fraud evidence; and (4) the evidence unrelated to mail fraud was insufficient to support appellant's Taft-Hartley and RICO convictions. In a related "spillover" argument, appellant asserts that the district court's errors in dealing with multiplicity in connection with the car payments require us to reduce the number of racketeering acts charged from thirty-five to four and that "[t]he prejudice of Mr. Sheeran being charged with so many Racketeering Acts is obvious." We have rejected the premise of this latter contention in part II.C.; hence, the argument falls of its own weight. The principal "spillover" argument is equally without merit, and we reject it.

III.

We will reverse appellant's mail-fraud convictions (counts 5-11) and remand those counts for a new trial. We will affirm appellant's RICO convictions (counts 1 and 2) and Taft-Hartley convictions (counts 3 and 4). We will vacate appellant's sentence on the RICO and Taft-Hartley convictions and remand for resentencing and reconsideration of the judgment of forfeiture.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U. S. Courts, The Legal Intelligencer, Phila., Pa.)

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No.82-1026

UNITED STATES OF AMERICA

VS.

SHEERAN, FRANCIS,
Appellant

(D.C. Crim. No. 80-36-2)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE --------- DISTRICT OF DELAWARE

Present: WEIS and BECKER, Circuit Judges; and CAHN, District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ---------- District of Delaware and was argued by counsel on October 19, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered December 11, 1981, be, and the same is hereby reversed with respect to appellant's mail-fraud

convictions (Counts 5-11), affirmed with respect to appellant's RICO convictions (Counts 1 and 2) and Taft-Hartley convictions (Counts 3 and 4), vacated with respect to appellant's sentence on the RICO and Taft-Hartley convictions, and the cause remanded for a new trial of the mail fraud convictions (Counts 5-11) and for resentencing and reconsideration of the judgment of forfeiture, all of the above in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS

Clerk

January 24, 1983

*Honorable Edward N. Cahn, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1026

UNITED STATES OF AMERICA,
Appellee

VS.

FRANCIS SHEERAN,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges

The petition for rehearing filed by appellant, Francis Sheeran in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is

denied.

By the Court,

/s/ EDWARD R. BECKER
Judge

Dated: FEB. 16, 1983

APPENDIX D

18 U.S.C. §1341

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed,

any such matter or thing, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

As amended Aug. 12, 1970, Pub.L. 91-375, §6(j)(11), 84 Stat. 778.

APPENDIX E

18 U.S.C. §1503

§ 1503. Influencing or injuring officer, Juror, or witness generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, ot other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him or on account of his being

or having been such juror, or injures any such officer, commissioner, or the committing magistrate in his person, or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

APPENDIX F

§ 1961. Definitions

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery, section 224 (relating to sports bribery), section 471, 472 and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 791-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to ob-

struction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union

funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof:

(3) "person" includes any individual, or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity"

requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the laws of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal laws, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or

agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

Added Pub.L. 91-452, Title IX §901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub.L. 95-575, §3(c), Nov. 2, 1978, 92 Stat. 2465; Pub.L. 95-598, Title III, §314(g), Nov. 6, 1978, 92 Stat. 2677.

APPENDIX F

18 U.S.C. §1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of any unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or

their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged, in, or, the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub. L. 91-452, Title IX, $ 901 (a), Oct. 15, 1970, 84 Stat. 942.

APPENDIX F

18 U.S.C. §1963

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to

forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or

any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the right of innocent persons.

Added Pub.L. 91-452, Title IX, § 901 (a), Oct. 15, 1970, 84 Stat. 943.

APPENDIX G

29 U.S.C. §186

§ 186. Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an emloyer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value---

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or officer or employee thereof, which represents seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or

committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other things of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this

section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property of commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money

or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personal administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not

be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance,

or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results

of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pension or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by an employer to a pooled or individual trust fund established by such representative for the

purpose of (A) scholarships for the benefit of employees, their families and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees; Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice; Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal

service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents or (iii) against any other employer or labor organization, of their officer or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industrywide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor-Management Cooperation Act of 1978.
As amended Oct. 27, 1978, Pub.L. 95-524, §6(d), 92 Stat. 2021.

APPENDIX H

Federal Rules of Evidence 404(b) provides:

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Federal Rules of Evidence 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."